Shaddock & Associates Pty Ltd v Parramatta City Council (No 1) [1981] HCA 59; (1981) 150 CLR 225 (28 October 1981)

HIGH COURT OF AUSTRALIA

SHADDOCK & ASSOCIATES PTY. LTD. v. PARRAMATTA CITY COUNCIL (No. 1) [1981] HCA 59; (1981) 150 CLR 225

Negligence - Damages

High Court of Australia
Gibbs C.J.(1), Stephen(2), Mason(3), Murphy(4) and Aickin(5) JJ.

CATCHWORDS

Negligence - Duty of care - Liability for erroneous information - Information given by municipal authority about existence of road widening proposals - Information sought by solicitor for intending purchaser of land - Telephone inquiry - Written request - Reply omitting reference to road widening proposals.

Damages - Measure of damages for negligent mis-statement.

HEARING

1980, September 10, 11; 1981, October 28. 28:10:1981
APPEAL from the Supreme Court of New South Wales.

DECISION

1981, October 28.
The following written judgments were delivered: -
GIBBS C.J. The appellant companies, the plaintiffs in the Supreme Court of erroneous information supplied to them innocently but negligently by the respondent, the Council of the City of Parramatta. The learned trial judge, Waddell J., found that the Council had been careless but that it owed no relevant duty of care to the appellants. He accordingly gave judgment for the Council although, following a very useful practice, he nevertheless proceeded to assess damages lest his decision as to liability should be reversed. He held that if he was in error on the question of liability the amount of damages to which the appellants would be entitled is $173,938. The Court of Appeal, by a majority, affirmed his decision dismissing the appellants' action (1979) 1 NSWLR 566 . (at p228)

2. On 21 May 1973 the appellants entered into a contract for the purchase of a property on the corner of Macquarie and O'Connell Streets, Parramatta. Settlement under the contract took place on 9 July 1973. The property was bought for the purpose of redevelopment. The appellants would not have concluded the purchase if they had known that the land would be substantially affected by road widening proposals which had been approved in principle by the Council in 1971. On 10 May 1973 their solicitor, Mr. Carroll, made a telephone call to the Council and inquired from an unidentified person in the town planning department whether there was any local road widening proposal affecting the land. He was told that there was not. On the following day he lodged with the Council a document, in a form prepared by law stationers, and commonly used, by which he made application for certificates under s. 160 and s. 342AS of the Local Government Act 1919 (N.S.W.), as amended, and for "Other information indicated under Remarks". Under that heading the question was asked, "Is the property affected or proposed to be affected by any of the following . . . Road widening or re-aligning proposals?" The form showed as the purchaser one of the appellant companies, and stated that the purpose for which the information was required was "Conveyancing". Fees for the issue of certificates under s. 160 and s. 342AS were enclosed but no fee was sent for the additional information and none was customarily sent or required. In response to this application Mr. Carroll received a certificate under s. 342AS with respect to the matters prescribed by cl. 9 of Ordinance 107 as matters with respect to which a Council is authorized to issue certificates under s. 342AS. Those matters do not include the effect on the land to which the certificate relates of a proposed local road widening scheme which is not included in a prescribed scheme or a scheme in course of preparation; the local road widening proposals in the present case were not so included, and there was no obligation under s. 342AS or Ordinance 107 to include the information in a certificate issued under that section. However, Mr. Carroll believed, and in consequence the appellant companies believed, that the absence of any notation as to a local road widening proposal on the certificate indicated that there was no such proposal. His previous experience indicated that it was the practice of the Council, when it received a request for a certificate under s. 342AS and for additional information as to whether the property was proposed to be affected by road widening proposals, and when there was a relevant proposal, to type or write (usually in red ink) a reference to the proposal at the foot of the certificate, below the space left for answers to the questions as to the matters prescribed by Ordinance 107. During the period from 1970 to May 1973 he had received about eight such certificates and had seen at least two others sent to other solicitors. Evidence given by the Town Clerk of the Council showed that it was the practice of the Council to give information, other than that which the Council was authorized by s. 342AS to give, including information as to road widening proposals, both orally over the telephone and by indorsements on certificates issued under s. 342AS. An examination of the files of the Council revealed that about ten thousand certificates under s. 342AS had been issued during the period from January 1971 to July 1973, of which about six hundred and fifty had been indorsed with a reference to road widening proposals. The evidence abundantly supports the finding of the learned trial judge that it was the practice of the Council to answer inquiries as to the existence of any road widening proposals made by the use of the law stationers' form by making an appropriate indorsement on the certificate issued under s. 342AS if there was such a proposal. In the light of this practice Mr. Carroll was led to believe, by the absence of any such notation on the certificate which he received, that there were no relevant road widening proposals. Although the relevant proposals were not formally adopted until February 1974, there was little doubt, in May 1973, that they would be implemented and would seriously affect the subject land. The proposals were embodied in a plan in the Council's records. The Council had referred to them in certificates in relation to other land in the vicinity. There is no evidence which would explain the failure to make a similar reference in the certificate issued to Mr. Carroll. (at p230)

3. There is no doubt that the officer of the Council who answered the telephone was careless in stating that there was no local road widening proposal affecting the land. It is however a critical question whether the Council, in issuing a certificate which was silent as to the road widening proposals, thereby informed Mr. Carroll that there were no such proposals. The question is not

free of difficulty. The law of evidence provides an analogy. The failure to answer a letter is not evidence of the truth of the statements in it unless the relation between the parties is such that a reply might properly be expected, as e.g., where it is the ordinary practice of people to reply: Wiedemann v. Walpole (1891) 2 QB 534, at p 538 ; Young v. Tibbits [1912] HCA 23; [1912] HCA 23; (1912) 14 CLR 114, at p 122 . In the present case, having regard to the practice of the Council to indorse information as to road widening proposals at the foot of the certificates, its failure to do so when it had been asked, by the use of the form commonly employed, to supply the information for conveyancing purposes could reasonably have been understood by the recipient of the certificate as information that no proposal existed, and the Council ought to have known (although Mr. Carroll had not expressly informed it of his awareness of the practice) that it would probably be so understood. The return of the certificate unindorsed was therefore tantamount to the giving of information that there were no proposals; clearly it was careless to give such a certificate. (at p230)

4. The question then is whether there was a duty to answer carefully the questions put to the Council orally and in writing. It is now settled by the decisions in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1963] UKHL 4; (1964) AC 465 and Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt [1968] HCA 74; (1968) 122 CLR 556 (High Court) and [1970] UKPCHCA 2; (1970) 122 CLR 628; (1971) AC 793 (in the Judicial Committee) that a person can be liable for financial loss resulting from a negligent misstatement of fact or opinion, although the mis-statement was honestly made, and there was no fiduciary or contractual relationship between the parties. The question that is not settled by those authorities is what is the principle by which the courts are to determine whether a duty of care exists. The courts in those cases rejected the view that the principle stated by Lord Atkin in Donoghue v. Stevenson [1931] UKHL 3; (1932) AC 562, at p 580 , which is usually the starting point in any inquiry as to whether a duty of care exists (see Anns v. Merton London Borough Council [1977] UKHL 4; (1978) AC 728, at pp 751 - 752), provides the basis of liability in the case of negligent mis-statements. There are obvious differences between negligent words and negligent acts. In the first place, negligent words by themselves can cause no loss or damage - they cause loss or damage only because persons act in reliance on them. Secondly, people speaking on social or informal occasions may not uncommonly make statements or express opinions with much less care than if they were giving advice or information professionally or for business purposes. Thirdly, words may receive - and foreseeably receive - so wide a circulation that the application of the principle in Donoghue v. Stevenson might open the door to a multiplicity of claims for very large amounts of damages. Even if the third of these considerations were dismissed as irrelevant, the others would remain compelling. It would appear to accord with general principle that a person should be under no duty to take reasonable care that advice or information which he gives to another is correct, unless he knows, or ought to know, that the other relies on him to take such reasonable care and may act in reliance on the advice or information which he is given, and unless it would be reasonable for that other person so to rely and act. It would not be reasonable to act in reliance on advice or information given casually on some social or informal occasion or, generally speaking, unless the advice or information concerned "a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer", to use the words of Lord Pearce in Hedley Byrne (1964) AC, at p 539 . Equally it would not be reasonable to rely upon advice or information given by another unless the person giving it either had some special skill which he undertook to apply for the assistance of another or was so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry. Further a person should not be liable for advice or information if he had effectually disclaimed any responsibility for it. These general principles - they are not hard and fast rules - were accepted by the majority of their Lordships in Hedley Byrne, although Lord Devlin expressed a rather different point of view. The same general principles are supported by the judgments of the members of this Court in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt [1968] HCA 74; (1968) 122 CLR 556 . (at p231)

5. However, it was held by the majority of the Judicial Committee in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt [1970] HCA 46; (1970) 122 CLR 628; (1971) AC 793 that this duty of care is cast only on a person who carries on a business or profession which involves the giving of advice of a kind which calls for special skill and competence, or on a person who, although not carrying on such a business or profession generally, has let it be known that he claims to possess skill and competence in the subject matter of the particular inquiry comparable to those who do carry on the business or profession of advising on the subject matter and is prepared to exercise a similar skill and competence in giving the advice (1970) 122 CLR, at pp 637-638; (1971) AC, at pp 805-806 . It was recognized that in regard to the subject matter with which their Lordships were concerned - financial stability and safety of investment - no distinction need be drawn between "information" and "advice" (1970) 122 CLR, at p 633; (1971) AC, at p 802 . Their Lordships did not intend to state the principles exhaustively so as to cover every case; they emphasized (1970) 122 CLR, at p 642; (1971) AC, at p 809 "that the missing characteristic of the relationship which they consider to be essential to give rise to a duty of care in a situation of the kind in which Mr. Evatt and the company found themselves when he sought their advice, is not necessarily essential in other situations - such as, perhaps, where the adviser has a financial interest in the transaction upon which he gives his advice." (at p232)

6. Lord Reid and Lord Morris of Borth-y-Gest, who dissented, took a broader view. They held that: " . . . when an inquirer consults a business man in the course of his business and makes it plain to him that he is seeking considered advice and intends to act on it in a particular way . . . his action in giving such advice" . . . (gives rise to) . . . "a legal obligation to take such care as is reasonable in the whole circumstances." (I have cited the passage in the abbreviated form suggested by Lord Denning M.R. in Howard Marine & Dredging Co. Ltd. v. Ogden & Sons (Excavations) Ltd. [1977] EWCA Civ 3; ; (1978) QB 574, at p 591 .) They said (1970) 122 CLR, at p 646; (1971) AC, at p 812 , that they were "unable to accept the argument that a duty to take care is the same as a duty to conform to a particular standard of skill", and continued: "One must assume a reasonable man who has that degree of knowledge and skill which facts known to the inquirer (including statements made by the adviser) entitled him to expect of the adviser, and then inquire whether such a reasonable man could have given the advice which was in fact given if he had exercised reasonable care." (at p232)

7. On either view, the duty in my opinion can exist in relation to the giving of information as well as advice. This was the view of Barwick C.J. in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt, who pointed out (1968) 122 CLR, at p 572 , that in many instances the distinction between the two is very slight and that on occasion information becomes inextricable from advice. Taylor J., one of the dissentients, disagreed; he did not regard Hedley Byrne as authority for the proposition that a duty of care will arise whenever one person makes inquiry of another, merely because the latter is, or is thought to be, in possession of special information relating to the subject matter of the inquiry or is in a better position than the inquirer to obtain such information (1968) 122 CLR, at pp 591, 601 . In Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt, Lord Diplock, who delivered the judgment of the majority, said (1970) 122 CLR, at pp 634-635; (1971) AC, at p 803 :
"Where advice which calls for the exercise of special skill and competence by the adviser is not to be based exclusively upon facts communicated to him by the advisee no relevant distinction can be drawn between the ascertaining by the adviser of the facts upon which to base his judgment as to the advice to be given, and the forming of that judgment itself. The need for special skill and competence extends to the selection of the particular facts which need to be ascertained in order to form a reliable judgment and to the identification of the sources from which such facts can be obtained." (at p233)

8. I respectfully agree with the opinion of Barwick C.J. that there is no valid ground on which to

distinguish between information and advice for the purposes of the rule in Hedley Byrne. Although the giving of advice must always necessarily require an exercise of skill or judgment, and the giving of information may not necessarily do so, a person giving information may be so placed that others can reasonably rely on his ability carefully to ascertain and impart the information. Other authorities support this view. A prospective tenant of a site for a filling station may reasonably rely on a statement made by an employee of an oil company, the owner of the site, as to the potential through-put of the filling station; the oil company has a duty to use reasonable care to see that the information is correct: Esso Petroleum Co. Ltd. v. Mardon [1976] EWCA Civ 4; (1976) QB 801 . The owners of a sea-going barge must take reasonable care to answer correctly a question put by a prospective hirer as to the deadweight capacity of the barge: Howard Marine & Dredging Co. Ltd. v. Ogden & Sons (Excavations) Ltd. [1977] EWCA Civ 3; (1978) QB 574 . I can see no reason in principle why a person who, being possessed of special knowledge or means of knowledge, undertakes to impart information to another, and is aware that the other will act in reliance on the information, should be in a different position from a person who, being possessed of special skill, undertakes to advise another, knowing that the other will act on his advice. The attention paid in the authorities on this question to Low v. Bouverie (1891) 3 Ch 82 indicates that the rules apply equally to information and advice, for in that case it was information, not advice, that was sought from the defendant trustee. (at p234)

9. The judgment of the majority in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt has been much criticized by academic writers, and in at least two cases in the Court of Appeal a preference has been expressed for the minority view: Esso Petroleum Co. Ltd. v. Mardon (1976) QB, at p 827 , per Ormrod L.J.; Howard Marine & Dredging Co. Ltd. v. Ogden & Sons (Excavations) Ltd., per Lord Denning M.R. (1978) QB, at p 591 and per Shaw L.J. (1978) QB, at p 600 . This Court, unlike the Court of Appeal of New South Wales, is free to adopt the view of the minority in the Judicial Committee rather than that of the majority. With all respect I find it difficult to see why in principle the duty should be limited to persons whose business or profession includes giving the sort of advice or information sought and to persons claiming to have the same skill and competence as those carrying on such a business or profession, and why it should not extend to persons who, on a serious occasion, give considered advice or information concerning a business or professional transaction. However, in the present case it does not seem to me to be necessary to decide whether the view of the majority or that of the minority in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt should be accepted. In this branch of the law it seems desirable to follow the example already set by the House of Lords and the Judicial Committee, and to avoid attempting to lay down comprehensive rules but rather to proceed cautiously, step by step. It is unnecessary in my opinion to choose between the conflicting views in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt because even if the views of the majority of the Judicial Committee are accepted, it should in my opinion be concluded that the respondent owed a duty of care to the appellants in the present case. Their Lordships in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt spoke of a business of giving advice or information, but emphasized that their opinion, like all judicial reasoning, must be understood secundum subjectam materiam (1970) 122 CLR, at p 643; (1971) AC, at p 809 . They did not have in view, and did not discuss, the case of a public body which, for the convenience of the public, follows the practice of giving on request information of which it has become possessed in the course of its public duties. From the standpoint of principle there is no difference between a person who carries on the business of supplying information and a public body which in the exercise of its public functions follows the practice of supplying information which is available to it more readily than to other persons, whether or not it has a statutory duty to do so. In either case, the person giving the information to another whom he knows will rely upon it in circumstances in which it is reasonable for him to do so, is under a duty to exercise reasonable care that the information given is correct. A public body, by following the practice of supplying information upon which the recipients are likely to rely for serious purposes, lets it be known that it is willing to exercise reasonable skill and diligence in ensuring that the information supplied is accurate. In the circumstances, diligence might be more

important than skill, although competence in searching for and transmitting the information must play a part. However, even if diligence only and not skill were required, a public body might be specially competent to supply material which it had in its possession for the purposes of its public functions. (at p235)

10. The conclusion that the duty now under discussion extends to public bodies which follow the practice of supplying information is supported by the decision of the Court of Appeal in Ministry of Housing and Local Government v. Sharp (1970) 2 QB 223 , where a rural district council, whose clerk had negligently failed to mention, in a certificate given in response to a search, made by an intending purchaser, of the register of local land charges, that the plaintiff Ministry had a charge on the land, was held liable for the loss suffered by the Ministry because the purchaser in consequence took the land free of the charge. It is true that this decision was given before Mutual Life& Citizens' Assurance Co. Ltd. v. Evatt, but since the decision in that case it has been mentioned without disapproval by Lord Edmund-Davies in Moorgate Ltd. v. Twitchings (1977) AC 890, at p 920 , and applied by Sir Robert Megarry V-C in Ross v. Caunters (1980) Ch 297, at pp 316-318 , and it was, in my respectful opinion, correct. (at p235)

11. In the present case, Mr. Carroll, as solicitor for the appellants, relied on the Council to exercise reasonable care in advising him whether the land was subject to local road widening proposals. It was reasonable for him to do so, because the Council was in a position to know better than anyone else whether any such proposals existed, and it commonly followed the practice of giving information as to that matter when requested. The Council ought to have known that Mr. Carroll's clients were relying on the information which he sought. The importance of certificates given under s. 342AS for conveyancing purposes is obvious and well known. It is true that Mr. Carroll did not expressly say what the purchasers intended to do with the land, but the Council ought to have known that the road widening, if carried out, would adversely affect the use of the land for most conceivable purposes. The Council was so placed that others could reasonably rely upon its ability to give accurate information as to any local road widening proposals, and it followed the practice, in the course of exercising its functions, of making such information available. The nature of the inquiry - made by a solicitor, for conveyancing purposes, on a form commonly used and prepared by law stationers - made clear the gravity of the inquiry and the importance attached to the answer. The Council therefore owed a duty of care to Mr. Carroll's clients, the appellants, in answering the written inquiry. (at p236)

12. It would not, however, have been reasonable for the appellants to have relied on an unconfirmed answer given by an unidentified person in response to an inquiry made over the telephone. The Council therefore owed no duty of care in making response to such an inquiry. (at p236)

13. It is clear from what has been said that the Council, in giving what amounted to a negative answer to Mr. Carroll's written inquiry, was in breach of its duty of care to the appellants. The fact that its negative answer was given by the omission to make a positive statement does not affect the question. The Council may have been entitled in law to decline to give the information sought, although to have taken that course might have rendered it liable to well-merited criticism. But for the reasons given, if it had wished to decline to give the information, it was bound to say so, because its failure to mention the local road widening proposals in the circumstances amounted to a statement that none existed. (at p236)

14. The remaining question is whether the damages assessed by the learned trial judge were excessive. The learned trial judge commenced by determining that the difference between the price paid by the appellants for the land and its value as affected by the road widening proposals was $133,000. This element in the assessment was not challenged before us. He then assessed consequential damage at $18,745. Three items in this part of the assessment also were not

challenged. The remaining items, which totalled $13,215, and which were challenged, comprised Council rates, and water and sewerage rates, for the years 1973 and 1974, land tax for 1974, insurance and the additional stamp duty and solicitors' costs payable because the price of the land was the contract price rather than the amount of its real value as affected by the proposals. It was submitted on behalf of the Council that if the appellants, who had the land, were given $133,000 in addition, they would be in the same position as if the land had not been affected by the proposals and that the payment to them of the additional items would give them a windfall benefit. It was submitted that if they had received the land unaffected by the road widening proposals they would have been bound to meet the additional expenses in question, and that since they were to be given an amount which would mean that they would receive the full value of the land in the condition in which they intended to buy it they should not be paid in addition the amounts which they would have been required to spend if the Council's representation that the land was unaffected by the proposals had been true. No question of directness, remoteness or foreseeability arises. The only question is whether in fact there has been a duplication in the assessment of damages. The appellants are entitled to be put, so far as money can do, in the same position as if they had not made the purchase. If the purchase had not been made the appellants would have kept the money paid to the vendor and would not have made the other payments in question. The award of $133,000, when added to the actual value of the land bought, recompensed the appellants for the payment out of the purchase money, but did not recompense them for the other expenses that they had to meet. It is true that the rates, tax, insurance, stamp duty and costs would have been payable if the land had not been affected by the road widening proposals, but it was so affected, and the payments would not have been made if the Council had not made the negligent mis-statement on which the action is founded. Of course the appellants were bound to mitigate their loss, but the learned trial judge was entitled to find that it was reasonable for the plaintiffs to continue to hold the land until the end of 1974, while they were exploring what could be done with the land and endeavouring to salvage what they could from the disastrous purchase. For these reasons the challenge made to the assessment of damages should not succeed. The assessment also included an amount of interest on the amount employed in the purchase from the date of purchase until the end of 1974 and this was not challenged. (at p237)

15. For these reasons I would allow the appeal and would enter judgment for the appellants in the amount of $173,938. (at p237)

STEPHEN J. The circumstances of this appeal sufficiently appear from the reasons for judgment of Mason J., which I have had the advantage of reading. (at p237)

2. The substantial issue is whether the City of Parramatta is liable in damages to the appellants because it misinformed them about the non-existence of road-widening proposals affecting a block of land in the municipality, in consequence of which the appellants completed the purchase of that land. Before coming to that issue some preliminary matters must be disposed of. This I can do quite briefly because of the considerable assistance which is to be had from the judgments in the Court of Appeal (1979) 1 NSWLR 566 . (at p238)

3. The appellants through their solicitor, Mr. Carroll, made two inquiries of the Council. The first, by telephone, should not, in my view, be regarded as giving rise to any consequences in law. It was marked by informality: the person in the Council office to whom Mr. Carroll spoke remained unidentified and the advice which that person then and there gave over the telephone remained unconfirmed by any writing. It must be but rarely that information conveyed by unidentified voices answering a telephone at the offices of municipal councils will render those councils liable in damages for negligence if the information should prove to be incorrect. In my view neither a council nor an inquirer would, in the absence of quite special circumstances, regard the response to such an inquiry as carrying with it liability in damages if incorrect: this must especially be the

case when there exists a customary and more formal means of obtaining from a council the information which is sought. (at p238)

4. The appellants in this case also had recourse to such a customary and more formal means: through Mr. Carroll they made written application on the usual and appropriate printed form, just such an application as must each day be received in their hundreds by municipal councils throughout New South Wales. The form disclosed that the inquiry was by a firm of solicitors, was in respect of a specific piece of land within the municipality and was made for "conveyancing" purposes. It named two parties, one described as "Owner", the other as "Purchaser". It conveyed to the Council quite clearly that what was in question was a sale of property and that it was in connexion with that sale that the inquiry was being made. (at p238)

5. The Council's response to the inquiry was to return the printed form with the answer to the question whether the property was affected by any "Road widening or re-alignment" proposals left blank. In the Court of Appeal, Mahoney J.A., affirming the finding of the primary judge, said (1979) 1 NSWLR, at p 596 : "that a reasonable man in Mr. Carroll's position would, in the light of what the council had done on previous occasions, take the council to be giving him to understand that there were no proposals. In addition, I think that the council by what it did, intended so to do. . . . I think it should be inferred that the fact that no reference was made to the proposals on the certificate resulted from the council following the course of conduct to which I have referred; and the council should be seen as giving the plaintiffs to understand that there were no proposals." Moffitt P. was of the same view. In my view their Honours were clearly right in their conclusion and I adopt, with respect, their respective reasons. Neither the fact that the application was not made in duplicate, as the instructions on the form required, and that the Council's answer was, in effect, a silent one nor the fact that the Council was under no statutory duty to give any answer, serves to deny to it the character which the parties themselves regarded it as possessing: that of an answer in the negative by the Council to the question whether any road-widening proposals affected the land described in the appellants' form. (at p239)

6. This, then, clears the way to the question of substance: is the Council liable in damages for supplying this admittedly erroneous information? The response to this would be clearly "Yes" if this were a case of advice given by someone in the course of their business or profession, the advice requiring the possession and exercise of special skill or competence - Hedley Byrne & Co. Ltd. v. Heller& Partners Ltd. [1963] UKHL 4; (1964) AC 465 and Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt [1970] UKPCHCA 2; (1970) 122 CLR 628; (1971) AC 793 . However the respondents contend that, as a result of the judgment of those of their Lordships comprising the majority in the latter of these two cases, no duty of care can be said to have arisen on the part of the Council in relation to the answer given by it to the appellants' question. Such a duty of care only arises, it is said, where advice or information is given by those who possess or profess some special skill or competence in the subject matter of the advice or information, as by being engaged in a business or profession involving the exercise of such skill or competence, and whose course of conduct involves the furnishing of advice or information to others. This is said to be the positive limitation imposed by Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt. There is also said to be a negative limitation: that no duty of care arises merely from the fact that the giver of the advice knows that what he says is to be relied upon by the recipient and that it is sought of him in a serious, as distinct from a merely casual or social, context. (at p239)

7. That their Lordships stated this second, negative proposition is, I think, undoubtedly correct, as appears from p. 638 of the report of Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt (1971) A.C., at p. 806). They did so because they did not regard the element of known reliance as involving any claim by the adviser that he possessed particular and relevant skill and competence which he was prepared to exercise on the inquirer's behalf. But, with respect to those who think otherwise, I do not understand their Lordships' judgment as confining the existence of a duty of

care to quite those limits which a narrow understanding of what is said to be the first, positive proposition would require. (at p240)

8. Their Lordships warned (1970) 122 CLR, at p 643; (1971) AC, at p 809 that their opinion in the instant appeal "like all judicial reasoning, must be understood secundum subjectam materiam". The context in which the judgment is to be understood is one in which "the fatal gap" in Mr. Evatt's case was the absence of any allegation that "the company to the knowledge of Mr. Evatt carried on the business of giving advice upon investments or in some other way had let it be known to him that they claimed to possess the necessary skill and competence to do so and were prepared to exercise the necessary diligence to give reliable advice to him" (1970) 122 CLR, at p 642; (1971) AC, at p 809 - Their concern was, accordingly, with what might be inferred, in reliance upon the doctrine of holding out, from the conduct of those engaged in business or a profession. It was in that context that their Lordships discerned two elements, the existence of which would establish a duty of care: the possession of skill or competence such as was necessary to supply the information sought and a willingness to put that skill or competence at the disposal of others. They concluded that to hold oneself out both as possessing relevant skill or competence in the giving of advice and as willing to put that skill or competence to work for others would give rise to a duty of care. Such a situation, they said, would commonly arise when the adviser was engaged in a particular business or profession which involved the giving of advice calling for skill and competence (1970) 122 CLR, at p 637; (1971) AC, at p 805 . (at p240)

9. But their Lordships were careful, on more than one occasion, to make it clear that it was no hard and fast rule which they were enunciating (1970) 122 CLR, at pp 638, 642; (1971) AC, at pp 806, 809 . They deplored the notion that Hedley Byrne should be regarded as laying down "the metes and bounds of the new field of negligence to which the gate is now opened" (1970) 122 CLR, at p 642; (1971) AC, at p 809 . They described their own decision as but one step in the step by step ascertainment of the limits of that new area. I do not understand their judgment as in any way suggesting that it is only those engaged in private enterprise, in particular trades or professions, who may attract such a duty of care: and this has certainly not been the view which the Canadian Supreme Court has taken of their Lordships' judgment - Hodgins v. Hydro-Electric Commission of Nepean (1975) 60 DLR (3d) 1, at p 10 . Indeed, in a line of Canadian cases to which I will come the duty has been applied to municipal authorities in circumstances similar to those in the present case. (at p241)

10. In Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt the context was the carrying on of a particular description of business, from which the necessary element of holding out was unsuccessfully sought to be extracted (1970) 122 CLR, at p 637; (1971) AC, at p 805 . In other contexts conduct of a quite different kind may suffice. For example, one who holds himself out as being, by reason of having set up a system for its gathering and collation, in possession of special knowledge, especially when he has a monopoly of that knowledge, and who further holds himself out as providing the fruits of that system to those who seek it, should be subject to such a duty. Such, I think, is the position of this Council; and, consistently with the views of the majority in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt, that appears to me to be enough to attract to the Council a liability for negligent mis-statement. (at p241)

11. What much concerned their Lordships was what they perceived to be the absence of any ascertainable objective standard by which to judge particular conduct, were the duty of care to apply quite generally (1976) 122 CLR, at p 635; (1971) AC, at p 803 . This led them to conclude that there was "no halfway house" between the simple duty of honesty owed by all, irrespective of skill, and the special duty of care which they acknowledged to apply in appropriate cases (1976) 122 CLR, at p 636; (1971) AC at p 804 . In the present case there is no call for any such half-way house: just as their Lordships (1976) 122 CLR, at p 635; (1971) AC, at p 803 regarded the case of a banker giving a gratuitous reference as providing an instance where an ascertainable standard of

care exists, so too will such a standard exist when a New South Wales municipal council carries out its familiar daily task of dealing with inquiries made of it on the standard form used in such cases. The appropriate objective standard of care will be no less ascertainable; it will be capable of proof by evidence of what is reasonable conduct on the part of such councils in performing that task. In the present case the existence of such an objective standard of care was not in issue; it was rather the existence of the duty of care that was in debate between the parties. (at p242)

12. In the present case the Council had, as Moffitt P. puts it, set itself up as an information centre. It alone possessed the store of information which was of quite vital concern to those who owned or contemplated acquiring property in its municipal district. This was information which the Council must be taken to have known would, as a matter of course, be sought from it by all those concerned with property dealings in the municipality. As a matter of course it supplied that information, in common with other councils, as a regular and constant activity. It was under no statutory duty to furnish such information; whatever may be thought to be the effect of s. 342AS of the Local Government Act 1919 (N.S.W.), it does not extend to the particular information here in question. But it had voluntarily devised a system and method by which it could readily make the information available to inquirers. (at p242)

13. The information in question was of a kind which was known by all to be of great importance to those seeking it and it was largely inaccessible through other channels. Moreover, much of the information sought would concern the Council's own actions. But it would be worse than valueless, it might be positively harmful in its effect, should it prove to be incorrect. In those circumstances it cannot, I think, be supposed that the Council did not hold itself out as exercising care in relation to this information which it offered to impart. The matter can be looked at in this way. Were a council expressly to qualify its answers, stating that they might be subject to errors for which it accepted no responsibility, the present practice would be rendered largely worthless. Conveyancers could no longer rely upon a council's answers and would instead, in the case of each transaction, have to engage in extensive searches of council records, no doubt to the great inconvenience of all concerned. Why this does not now occur is because councils are rightly regarded as holding themselves out as exercising care in the answers they give. (at p242)

14. It is true that what the Council was in the habit of supplying and which it in fact supplied, albeit incorrectly, in the present case was scarcely advice; it more readily answers the description of information, although the precise boundary between the two is no doubt difficult to draw. But in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt their Lordships drew no distinction between the two (1970) 122 CLR, at pp 633-634; (1971) AC, at pp 802-803 , any attempt to do so seems to be unnecessary in principle and likely to lead to insoluble problems in practice. (at p243)

15. It was said that in providing the information the Council was doing nothing which involved special skill or competence and that their Lordships refer to the possession of special skill and competence. But, as already mentioned, they do so because they assume circumstances in which the use of care by the supplier of information is only to be inferred from the fact that that supplier is possessed of special skill or competence. Where, as in the present case, the supplier is the exclusive possessor of essential information concerning a matter of importance, such as the buying and selling of property, and, being a local government body, sets itself up as a centre from which, in a quite formalized fashion, this information is distributed to those who require it, it requires no holding out of special skill or competence in order to lead to the inference that care will be taken in furnishing that information. The circumstances are such as of themselves to lead irresistibly to that conclusion. It follows that if, which I doubt, it were correct to deny to the Council skill or competence in marshalling and having available its store of information, this would not, in the particular circumstances of this case, relieve it of its duty of care. (at p243)

16. It is for the foregoing reasons that I have concluded that nothing said by their Lordships who were in the majority in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt denies the existence of a duty of care owed by the Council to the appellants. It is noteworthy that in Canada a number of decisions have held municipal corporations to be liable in damages for negligent misrepresentation. These cases apply the doctrine in Hedley Byrne to situations very similar to the present, Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt being seen as involving no relevant qualification. The earliest of these cases, Windsor Motors Ltd. v. District of Powell River (1969) 4 DLR (3d) 155 , preceded Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt but I mention it because it has been much cited in later cases. It concerned incorrect advice by a municipality about the zoning of land and to it the principle in Hedley Byrne [1963] UKHL 4; (1964) AC 465 was held applicable. Then in 1972, in Gadutsis v. Milne (1972) 34 DLR (3d) 455 the City of Toronto was held liable in damages for negligent misrepresentation concerning permitted uses in a particular zone of the city. The Windsor Motors Case was referred to and Hedley Byrne was relied upon as establishing liability. Of Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt it was observed (1972) 34 DCR (3d), at p 459 that, unlike the case of the insurance company there in question, the City's "employees in the zoning department . . . were there to give out information as to zoning". Gadutsis was applied in H.L. & M. Shoppers Ltd. v. Town of Berwick (1977) 82 DLR (3d) 23 , again a case of the giving of incorrect information by a municipality. Particular reference was made to the feature stressed in Gadutsis, the function of the municipality in giving advice to prospective builders. See also Jung v. District of Burnaby (1978) 91 DLR (3d) 592 . (at p244)

17. Both in England and in Canada, as in this country, there has of course been considerable judicial and academic consideration, in other contexts, of the interaction of Hedley Byrne and Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt. But for present purposes I can confine citation of authority to this line of Canadian cases, concerned with the special case of information given by municipal authorities concerning municipal affairs; adding perhaps only a reference to Town of the Pas v. Porky Packers Ltd. (1976) 65 DLR (3d) 1 , a decision of the Canadian Supreme Court in which, although ultimately turning upon a different point, Windsor Motors was cited and in which the view taken of Hedley Byrne was wholly consistent with the line of cases already mentioned. (at p244)

18. There remains only a matter of the assessment of damages. As to it I am in agreement with all that Mason J. has said and have nothing which I would wish to add. (at p244)

19. I would allow the appeal, set aside the judgment below and enter judgment in favour of the appellants for $173,938. (at p244)

MASON J. By a contract dated 21 May 1973 the appellants purchased a property on the south-east corner of Macquarie and O'Connell Streets, Parramatta, for $417,250. This purchase was completed on 9 July 1973. The appellants intended to redevelop the land in about three to five years by erecting a commercial building when a proposed nearby office complex was expected to make this profitable. The approximate area of the land was 1,552 sq. metres, that is, 16,706 sq. ft. The land was zoned under the County of Cumberland Planning Scheme Ordinance and the Draft Parramatta Planning Scheme Ordinance in such a way as to permit the intended redevelopment and there was no provision in the town planning schemes for widening or realigning either Macquarie Street or O'Connell Street. (at p244)

2. At the time of the purchase the appellants were unaware that the respondent Council had a proposal for the widening of O'Connell Street and Macquarie Street. This proposal was first approved in principle by the Council by resolution made on 3 August 1971. Although the proposal was not formally confirmed until the Council's resolution of 11 February 1974, the trial judge, Waddell J., found that "by May 1973 only details were in question and there was no reason to doubt that the proposal would be adopted". The proposal required the acquisition of more than a

third of the land, reducing its area to about 10,500 sq. ft. The appellants claimed that the residue of the land would be unsuitable for their proposed redevelopment and Waddell J. accepted that they would not have purchased the property if they had been aware of the proposal. (at p245)

3. The appellants claimed damages for negligent mis-statement alleged to have been made by or on behalf of the respondent in answer to verbal and written inquiries made by the appellants' solicitor to the effect that in May 1973 the respondent did not have any such road-widening proposal. At first instance, Waddell J. held that no duty of care was imposed on the respondent in its voluntary supply of answers to the inquiries of the appellants. On appeal, the New South Wales Court of Appeal (Hutley and Mahoney JJ.A.; Moffitt P. dissenting) also held that the Council was not under a relevant duty of care to the appellants (1979) 1 NSWLR 566 . The appellants have appealed to this Court. (at p245)

4. Before considering the critical issue of duty of care it is necessary to set out the circumstances surrounding the two alleged misstatements made by the Council. The appellants relied on (1) an oral conversation between the appellants' solicitor, Mr. Carroll, and an officer of the Council; and (2) an application made for a certificate under s. 342AS of the Local Government Act, 1919 (N.S.W.), as amended, and the Council's written reply to that application. (at p245)

5. As to (1): On 10 May 1973, Mr. Carroll telephoned the town planning department of the Council. He described himself as a member of the firm of solicitors acting for purchasers of the land which he identified. He inquired, inter alia, whether the property was affected by any local road-widening proposals. Waddell J. was "completely satisfied" that Mr. Carroll was told that there was no local road-widening proposal affecting the subject land. Mr. Carroll did not ask the name of the person who answered his inquiry and did not seek to confirm this information by letter to the Council. The learned trial judge was also satisfied that if the existence of the road-widening proposal had been disclosed, then Mr. Carroll would not have exchanged contracts on behalf of the appellants without ascertaining details of the proposal and that, if aware of the nature of the proposal, the appellants would not have exchanged contracts. His Honour also accepted that for a period of years which included the month of May 1973, it had been the practice of the engineering and town planning department of the Council to answer telephone inquiries relating to such matters as road proposals. (at p246)

6. As to (2): Following the telephone conversation, Mr. Carroll on 11 May 1973 made a written inquiry concerning the land. Section 342AS of the Local Government Act provides that a person may apply to the Council for a certificate that land is or is not land to which a prescribed planning scheme relates or to which the interim development provisions of the Act apply. By Ord. 107, cl. 9, the Council may issue a certificate under s. 342AS setting forth the matters relating to zoning and town planning referred to in that clause. No form for the making of an inquiry of the Council was prescribed. Mr. Carroll used a form prepared by a firm of law stationers which was then commonly used by solicitors. The form provided for inquiries in respect of matters falling within the statutory provisions but also contained printed material going beyond those matters. The form stated -

> "Application is hereby made for the issue of -
> (a) Certificate under Section 160 (fee $2)
> (b) Certificate under Section 342AS (fee $2)
> (c) Other information indicated under Remarks
> (Delete items not required)"

and had at its foot a portion reading -
"REMARKS: (Please delete information not required. If information is required this form must be

supplied to the Council in duplicate.)
Is the property affected or proposed to be affected by any of the following:

> . . .
> 6. Road widening or re-aligning proposals;
> . . . "

There was provision in the form opposite, inter alia, question 6 for a "Reply". It should be noted that this road-widening proposal was not required to be shown in a 342AS certificate. Nor was there any legal obligation on the Council to answer the additional questions. (at p246)

7. The form was not sent to the Council in duplicate. However, the evidence established that in so far as it answered what the form required, the Council did not use this form for the purpose of providing its answers. It used a form based upon the statutory form of certificate under s. 342AS (form 4, Ord. 107). That form made no provision in its printed terms for answers to questions concerning, inter alia, road-widening proposals. The trial judge from the evidence adduced, drew the inference that "at all relevant times it was the practice of the defendant Council to answer inquiries made by use of the (law stationer's) form as to the existence of any road-widening or realigning proposal by making an appropriate indorsement on the 342AS certificate in red typing or red ink if there was such a proposal". (at p247)

8. The 342AS certificate supplied by the Council was signed on 25 May 1973 and was received by Mr. Carroll some time before 9 July 1973, the date on which the purchase was completed. There was no indorsement on that certificate concerning any road-widening proposals. The appellants, through Mr. Carroll, undoubtedly took the certificate to be an intimation by the Council that there were no relevant proposals. (at p247)

9. Waddell J. was satisfied that if Mr. Carroll or either of the appellants had become aware of the road-widening proposal on receipt of the 342AS certificate, the appellants would have exercised their contractual power of rescission and would not have proceeded to completion. Clause 17 of the contract gave a right to rescind in these circumstances. (at p247)

10. The learned trial judge also found that in fact the certificate was an intimation by the Council that there were no relevant proposals. The Council submits that that finding should be set aside. In my view the submission should be rejected. Once it is accepted that it was the Council's practice to add at the end of its form of certificate a notification of any relevant proposals, and that Mr. Carroll was aware of this practice, it is inevitable that a reasonable man in Mr. Carroll's position would take the Council to be giving him to understand that there were no proposals. In this respect I agree with what Mahoney J.A. said in the Court of Appeal. Further, this is what the Council intended. This is a situation in which the failure to answer a question amounts to an intimation of fact. (at p247)

11. Given that verbal and written mis-statements were made by the Council to the appellants, it is necessary to consider (1) Whether the Council owed a duty of care in supplying answers by telephone and/or the 342AS certificate. (2) If so, whether the mis-statements breached the duty owed. (3) The extent of damages suffered. (at p247)

12. Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1963] UKHL 4; (1964) AC 465 decided that Derry v. Peek (1889) 14 App Cas 337 did not establish the "universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action", in the words of Lord Reid (1964) AC, at p 484 . Subsequently this Court decided in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt [1968] HCA 74; (1968) 122 CLR 556 that a plaintiff had a cause of action against the defendant life assurance company in negligence when the plaintiff suffered loss by investing in a company in reliance on advice from the defendant which, being in a special

position to give accurate advice about the financial position of the other company, accepted the responsibility of giving advice to the plaintiff knowing that he intended to act upon it. On appeal [1970] UKPCHCA 2; (1970) 122 CLR 628; (1971) AC 793 the Privy Council by majority reversed the decision of this Court, the majority enunciating a narrow view of the circumstances in which liability for negligent mis-statement will arise, the minority offering a broader view, one which generally accorded with the observations of Barwick C.J. in this Court. (at p248)

13. This Court must now decide for itself what is the common law for Australia upon the topic, unfettered by the Judicial Committee's decision in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt (see Viro v. The Queen [1978] HCA 9; (1978) 141 CLR 88). The decision to be made, broadly speaking, calls for a choice between the view of liability expressed by the majority (Lord Hodson, Lord Guest and Lord Diplock) and the wider view of liability favoured by the minority (Lord Reid and Lord Morris of Borth-y-Gest) and by this Court. (at p248)

14. The majority judgment has attracted trenchant criticism from academic commentators, who regard it as a retreat from what was said in Hedley Byrne and who prefer the minority judgment. Moreover, on no less than two occasions members of the English Court of Appeal have expressed a preference, and in one instance a marked preference, for the minority judgment over the majority judgment - Esso Petroleum Co. Ltd. v. Mardon [1976] EWCA Civ 4; (1976) QB 801, at p 827 (Ormrod L.J.); Howard Marine and Dredging Co. Ltd. v. Ogden & Sons (Excavations) Ltd. [1977] EWCA Civ 3; (1978) QB 574, at p 591 , per Lord Denning M.R. and per Shaw L.J. at p. 600. (at p248)

15. The judgment delivered by Lord Diplock formulated a principle of general application; it cannot be put aside as a judgment which, though dealing with the liability of those who have an obligation to bring to bear skill and competence in the provision of advice and information, acknowledged that there is a general liability for negligent mis-statement on the part of others who do not possess or profess to possess skill and competence. (at p248)

16. According to the majority, a person comes under a duty of care in relation to the provision of advice or information if he carries on a business or profession and in the course of it provides advice or information of a kind which calls for skill and competence or he otherwise professes to possess skill and competence and he provides advice or information when he knows or ought to know that the recipient intends to act or rely on it. The majority also acknowledged that a duty of care may arise when the speaker has a financial interest in the transaction with respect to which the statement is made. The minority did not confine the existence of a duty of care to those who give advice or information which involves the possession of skill and competence or the professed possession of skill and competence. Lord Reid and Lord Morris of Borth-y-Gest thought that a businessman is under a duty of care in giving advice or information when he knows or ought to know that the recipient intends to rely or act on it. (at p249)

17. The principle expressed by Lord Hodson, Lord Guest and Lord Diplock was supported by reference to the following considerations: (1) the duty imposed by the common law upon those who follow a calling which required skill and competence to exercise in their calling such skill and competence as is appropriate to it; (2) the need for a duty of care owed by an adviser to relate to an ascertainable standard of skill and competence in the subject matter of the advice, as otherwise there can be no way of determining whether the adviser is in breach of duty; (3) the absence of a "halfway house" between the duty as formulated based on skill and competence "and the common law duty which each man owes his neighbour irrespective of his skill - the duty of honesty" (1970) 122 CLR, at p 636; (1971) AC, at p 804 ; and (4) the limitation in the American Restatement of the Law of Torts (2d), par. 552, of the duty of care in giving advice to persons who make it part of their business to supply advice, apart from the case where the speaker has a financial interest in the transaction. (at p249)

18. The response of the minority to the reasoning of the majority was largely designed to demonstrate that possession or professed possession of skill and competence was not an essential element in the foundation of a duty of care. Lord Reid and Lord Morris of Borth-y-Gest said (1970) 122 CLR, at p 646; (1971) AC, at p 812 :
"We can see no ground for the distinction that a specially skilled man must exercise care but a less skilled man need not do so. We are unable to accept the argument that a duty to take care is the same as a duty to conform to a particular standard of skill. One must assume a reasonable man who has that degree of knowledge and skill which facts known to the inquirer (including statements made by the adviser) entitled him to expect of the adviser, and then inquire whether such a reasonable man could have given the advice which was in fact given if he had exercised reasonable care." (at p250)

19. The minority did not decide whether the duty to take care was confined to the provision of advice in a business or professional context. They said (1970) 122 CLR, at p 644; (1971) AC, at p 811 : "It may be going too far to say that a duty to take care can only arise where advice is sought and given in a business or professional context . . . ". Barwick C.J. did not accept that the duty was so confined. (at p250)

20. According to the Chief Justice (1968) 122 CLR, at pp 572-573 , whenever a person gives information or advice to another upon a serious matter in circumstances where the speaker realizes, or ought to realize, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to act on that information or advice, the speaker comes under a duty to exercise reasonable care in the provision of the information or advice he chooses to give. (at p250)

21. In this formulation there are several points to be noted. First, liability for negligent mis-statement is not confined to those who carry on, or profess to carry on, a profession, business or occupation involving the possession of skill and competence (1968) 122 CLR, at pp 573-574 . The Chief Justice, like the minority in the Privy Council, was in disagreement with the majority in the Privy Council who drew a distinction between those who bring, or profess to bring, professional knowledge or skill into the preparation of their statements and those who do not do so and are not expected to do so, the latter being under no duty of care in relation to their statements (1970) 122 CLR, at p 637; (1971) AC, at p 805 . (at p250)

22. The restriction of liability to the class of persons identified in the majority judgment and in the Restatement, generally speaking, limits liability to those who can best afford to meet it. The judgment delivered by Lord Diplock makes no mention of this policy goal. The Restatement is more forthcoming. In commenting on par. 552 it states: "When the harm that is caused is only pecuniary loss, the courts have found it necessary to adopt a more restricted rule of liability, because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may follow from reliance upon it." (at p250)

23. There are several reasons why this policy consideration should not be regarded as paramount. In the first place, it denies a remedy to those who sustain serious loss at the hands of those who are not members of the class and whose conduct is negligent. Secondly, it ignores the availability of insurance as a protection against liability. Thirdly, there is no logic in excluding from the class of persons liable for negligent mis-statement persons who, though they may not exercise skill and competence, assume a responsibility to give advice or information to others on serious matters which may occasion loss or damage. Finally, the rule, recently established by Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" [1976] HCA 65; [1976] HCA 65; (1976) 136 CLR 529 , is that economic loss, not consequential upon property damage, may be recoverable from those whose negligence occasions it. (at p251)

24. It is for these reasons that I prefer the wider view to that expressed by the majority of the Privy Council in the M.L.C. Case. I consider that this Court should now adopt Barwick C.J.'s statement of the conditions which give rise to a duty of care in the provision of advice or information. It will be noted that his Honour specifically equated the provision of information with the giving of advice, a conclusion which conformed to his Honour's view that liability is not confined to those who carry on a profession or business. (at p251)

25. Cross L.J. expressed doubt in Ministry of Housing and Local Government v. Sharp (1970) 2 QB 223, at p 291 that a clerk who is by reason of careless searching responsible for the dissemination of incorrect information by his employer is liable for loss sustained by the recipient who acts on the information. But, if both employer and employee are aware, or ought to be aware, of the use to which the information is to be put, no distinction can be drawn between them. Lord Denning M.R. was right when he said that a clerk "was under a duty at common law to use due care. That was a duty which he owed to any person . . . whom he knew, or ought to have known, might be injured if he made a mistake." (1970) 2 QB, at p 268 . (at p251)

26. However, there will be situations in which an employer is liable in negligence for the dissemination of incorrect information, even though no employee is liable, because the employee is ignorant of the use to which the information is to be put. According to the majority of this Court in Darling Island Stevedoring and Lighterage Co. Ltd. v. Long [1957] HCA 26; (1957) 97 CLR 36, at pp 54, 60-65, 66-70 , the liability of the employer is not a vicarious liability, but is separate and independent, resulting from the attribution to the employer of the conduct of the employee; the employer is to answer for the servant's act as if it were his own. (at p251)

27. In the present case we are not concerned with advice given by a life assurance company in relation to an investment in which it had special knowledge, but with information furnished by a local authority, in relation to proposed road-widening proposals. There is no ground for confining the liability to those who engage in a business activity and for excluding those who provide negligent advice or information in the course of discharging a government or administrative responsibility. The citizen is just as likely to rely on the accuracy of advice or information given to him by a government department, a statutory authority or a local authority as he is to act on similar advice or information given by a person who carries on a business. And there is no persuasive reason for saying that the citizen who sustains damage as a result of information negligently given by a government department or authority has no remedy, although the citizen who sustains similar damage as a result of information negligently given by an investment adviser has a remedy. (at p252)

28. The suggestion that the imposition of a duty of care and consequential liability would unduly hamper statutory and local authorities in the discharge of their public functions is an unsupported assertion. Local authorities provide information and advice to citizens in connexion with a wide range of matters and in so doing, I assume, make a real endeavour to provide accurate information and advice. Recognition of the existence of a duty of care and consequential liability would make little difference, if any, to the standard of care taken in giving information and advice. An authority can, if it wishes, obtain protection against liability by means of insurance. (at p252)

29. It is inconceivable that the practice of giving information as to proposals affecting property will be discontinued merely because the provision of inaccurate information may expose an authority to liability. In the discharge of their public functions local authorities have in a practical sense an obligation to provide information of the kind now in question in response to a request. It is information of vital importance to an owner or intending purchaser. It materially affects the use to which the land may be put in the future and its value. Because it relates to intended acts of the authority, it is information which it alone possesses. In these circumstances it is improbable that the practice of providing such information would be discontinued, though it is possible that a fee

might be charged and that an endeavour might be made to exclude liability. That is quite a different matter. (at p252)

30. The specialized nature of the information, the importance which it has to an owner or intending purchaser and the fact that it concerns what the authority proposes to do in the exercise of its public functions and powers, form a solid base for saying that when information (or advice) is sought on a serious matter, in such circumstances that the authority realizes, or ought to realize, that the inquirer intends to act upon it, a duty of care arises in relation to the provision of the information and advice. In Canada it has been so held on a number of occasions - see, for example, Windsor Motors Ltd. v. District of Powell River (1969) 4 DLR (3d) 155 ; Gadutsis v. Milne (1972) 34 DLR (3d) 455 ; H.L. & M. Shoppers Ltd. v. Town of Berwick (1977) 82 DLR (3d) 23 ; Jung v. District of Burnaby (1978) 91 DLR (3d) 592 . Such are the functions and responsibilities of a local authority that it is possible that a local authority may come under a duty to provide accurate information in connexion with its activities or proposed activities. This is not a question which needs to be presently considered - it was not argued that the respondent was subject to such a duty in the present case. (at p253)

31. The principal issues which remain are - (1) whether the circumstances in which the requests were made were such as to raise a duty of care and, if so, (2) whether there was a breach of that duty. I doubt whether the oral inquiry made by Mr. Carroll brought the respondent under such a duty. The inquiry was oral and informal. Mr. Carroll did not identify the officer to whom he spoke. Nor did he follow up his oral request by confirming the conversation in writing. There is some room for doubt whether the officer realized, or ought to have realized, that Mr. Carroll or his clients were relying on the information supplied or that they were intending to act upon it. (at p253)

32. The second request, the written application for a s. 342AS certificate, stands in a different position. It was a formal request made by Mr. Carroll. The respondent dealt with it in the same fashion as it dealt with other requests at the time. It treated it as a request for information additional to the s. 342AS matters, notwithstanding that a duplicate form did not accompany the request. (at p253)

33. I would reject the respondent's argument that no duty of care arose because Mr. Carroll did not bring home to it the purpose to which the information would be put. True it is that he did not state why the information was wanted or what action his clients proposed to take on the strength of it. But the existence of a duty of care does not depend upon knowledge on the part of the speaker of the precise use to which the information will be put. It is enough if he knows, or ought to know, that the inquirer is requesting it for a serious purpose, that he proposes to act upon it and that he may suffer loss if it proves to be inaccurate. These requirements were satisfied in the present case. The fact that the request was made in association with an application for a s. 342AS certificate by a solicitor would cause any reasonable man to conclude that the request was made for a serious purpose, on behalf of an owner, intending purchaser or lender who intended to act upon the information provided and would in all probability suffer loss if the information were not accurate. (at p254)

34. The final question relates to the award of damages which the primary judge would have made had he found in favour of the appellants on the issue of liability. Included in the amount were items of consequential damage totalling $18,745. The primary judge assessed the value of the land as affected by the road-widening proposal in May 1973 at $284,000. The difference between this value and the purchase price paid by the appellants was in round figures $133,000. To this figure the judge added the consequential damage of $18,745 and an interest component of $22,193, making an overall assessment of $173,938. (at p254)

35. The respondent contests the inclusion in this amount of certain items of consequential damage amounting to $13,215. They were -

Council rates to 31 December 1973 $1,180
Council rates to 31 December 1974 2,725
Water and sewerage rates to 30 June 1974 630
Water and sewerage rates to 30 December 1974 850
Land tax 1974 1,418
Insurance 490
Additional stamp duty - purchase price $417,250

$10,432

less " " 210,000 4,725 5,707
Additional solicitors' costs - purchase price $417,250 $915
less " " 210,000, say 700 215

____
$13,215
________ (at p254)

36. The respondent submits that the approach to damages taken by the judge was to place the appellants in the same position as if the land had not been affected by the road-widening proposal and that there was no justification for giving them any compensation beyond that. The respondent says that the items in question were all expenses to which the appellants would have been subject if they had bought the land free from the road-widening proposal. (at p254)

37. The primary judge considered that the appellants would have been entitled to recover all items of consequential damage up to the end of 1974 because until that time "they were exploring what could be done with the land and making efforts to salvage what they could from what was in fact a disastrous purchase". His Honour found that the period up to the end of 1974 was a reasonable period. (at p255)

38. The respondent is right in saying that the items were expenses to which the appellants would have been subject had the land been free from the road-widening proposal. However, this does not prevent the expenses from constituting recoverable damage. The judge found that, but for the negligent mis-statement, the appellants would not have bought the land, the land being useless for the purpose for which it was acquired. Consequently, the appellants' loss includes, not merely the diminution in value of the land, but also the expenses of acquisition and retention for a reasonable time, expenses which would not have been incurred had the respondent not been negligent. It was not suggested that the items in question fell outside the boundary of foreseeability. The measure of recoverable damages for negligent mis-statement is the amount of money necessary to restore the plaintiff to the position he was in before the statement, subject to the loss being foreseeable. The test is somewhat different from that applied in deceit (Doyle v. Olby (Ironmongers) Ltd. (1969) 2 QB 158, at p 167) and breach of warranty. (at p255)

39. The relevant mis-statement by the respondent was made after entry into the contract by the appellants, but before completion. However, had the respondent informed Mr. Carroll of the existence of the proposal, the contract would have been rescinded and the stamp duty, if any, paid on the contract would have been recoverable. (at p255)

40. I would allow the appeal, set aside the judgment in favour of the respondent and enter judgment in favour of the appellants for $173,938. (at p255)

MURPHY J. In general, a person who makes a negligent misstatement in circumstances where he knows or should know that the person or persons to whom the mis-statement is made may rely upon it, is liable in damages for loss sustained by the person or persons as a result of relying upon the mis-statement. The liability extends to economic as well as non-economic loss (see Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt [1968] HCA 74; (1968) 122 CLR 556; (1970) 122 CLR 628; (1971) AC 793 (the M.L.C. Case); also Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" [1976] HCA 65; [1976] HCA 65; (1976) 136 CLR 529). (at p255)

2. The liability does not depend on the negligent mis-statement being of fact, it extends to negligent advice, but the information or advice must be on serious matters. The liability is not confined to those who have special skill or competence. This reflects the approach of this Court in the M.L.C. Case and departs from that of the Privy Council in the same case which restricted liability to those who possessed or professed special skill or competence on the subject of the mis-statement. For the purpose of this appeal, it is enough to hold that liability extends to those whose profession or business it is to give advice or information, whether gratuitously or not. (at p256)

3. This case commenced in March 1975, that is before the commencement of the Privy Council (Appeals from High Court) Act 1975 (8 July 1975). In this Court both parties accepted that the decision of this appeal involved the application of a law made by the Parliament, that is the Judiciary Act 1903, and of an instrument made under a law made by the Parliament, the High Court Rules. The decision is therefore covered by the Privy Council (Limitation of Appeals) Act 1968 so that no appeal will lie from this Court. It follows that this Court is not bound by the Privy Council decision in the M.L.C. Case and there is no justification for adhering to the error expressed by the Privy Council in that case. (at p256)

4. The oral statement made by the Parramatta Council in response to an oral inquiry on the subject of restrictions on land should not, but the written response to the written inquiry should, be regarded as coming within the category of circumstances which will give rise to liability. Where, as in the circumstances of this case, such inquiries and answers are usually in writing, an oral response to an oral inquiry should not, in the absence of some other compelling circumstance, give rise to liability for negligent mis-statement. The sense of this is shown by the fact the plaintiff was not content with the oral answer. (at p256)

5. The appeal should be allowed with costs, and in accordance with s. 37 of the Judiciary Act 1903 judgment should be entered in favour of the appellants for $173,938. (at p256)

AICKIN J. I have had the advantage of reading the reasons for judgment of my brother Mason with which I am in agreement. There is nothing that I can usefully add. I would allow the appeal and make the order as proposed in his judgment. (at p256)

ORDER

Appeal allowed with costs.

Order of the Supreme Court of New South Wales (Court of Appeal) set aside and in lieu thereof order as follows:

"Appeal allowed with costs.

Judgment of Waddell J. set aside and in lieu thereof give judgment for the plaintiffs in the sum of $173,938 with costs."

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